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Reactions to Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary Give Voice to the Law In the Face of (Counter) Terrorism

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REACTIONS TO INDEFINITE PREVENTIVE DETENTION: AN ANALYSIS OF HOW THE SINGAPORE, UNITED KINGDOM AND AMERICAN JUDICIARY GIVE VOICE TO THE LAW IN THE FACE OF (COUNTER) TERRORISM

EUNICE CHUA*

"[A]mid the clash of arms, the laws are not silent" — and it is up to judges to give voice to the law. Acts of terrorism have not ceased since 11 September 2001 and news of fresh attacks or foiled attempts continues to surface regularly. It is not surprising that in order to preserve the nation state, governments have used legislative tools to deter and punish terrorism, including the tool of indefinite preventive detention. In this article, I analyse the pieces of legislation providing for indefinite preventive detention in Singapore, the United Kingdom and the United States, as well as the judicial response to them. Adopting Justice Aharon Barak's approach, I submit that the ideal role for the judiciary in responding to counter-terrorism is two-fold: (1) to bridge the gap between law and society and (2) to protect the constitution and democracy.

I. INTRODUCTION

Terrorism is very much alive today in all corners of the world. The New York World Trade Centre suffered attacks in 1993 and yet again on 11 September 2001. Britain had to cope with bombings of its London buses and subways on 7 July 2005. However, no less worrisome are the foiled plots—more than 50 Muslim Americans have been arrested for various plots since 11 September and "close to 30 plots" have been uncovered by Britain's MI-5.[1] More recently, on 30 June 2007 and the days following, Britain had to deal with attempted car bombings at Glasgow Airport and in central London. Singapore has had its own near-miss with the discovery of the Jemaah Islamiyah plot targeting Yishun Mass Rapid Transit Station.

The international response to terrorism has been both quick and robust. This paper seeks to canvass the different judicial responses to one aspect of counter-terrorism in the United States of America (the "USA"), the United Kingdom ("UK") and Singapore—indefinite preventive detention. It also attempts to postulate an ideal role for the judiciary to play in counter-terrorist efforts. Due to this focus, the most recent development in the USA, namely the enactment of

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1 Chua Lee Hoong, "Long Shadow of Terrorism" *The Straits Times* (11 December 2006).

the Military Commissions Act, which has attracted little judicial discussion, will not be canvassed in detail.

II. The Judiciary and Counter-Terrorism

Alexander Hamilton described the judiciary as:

> [H]a[ving] no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society . . . It may truly be said to have neither the Force nor Will, but merely judgement . . . The judiciary is beyond comparison the weakest of the three departments of power.[2]

Why then do we look to the judiciary to check the executive and the legislature, especially when they wield extraordinary powers of detention that would seek to circumvent the judicial system? It has been said that the ultimate check on government is democracy, but consider a country like Singapore where the People's Action Party ("PAP") has been in power since 1959. Such a check is illusory. Yet even in multi-party countries, the people may fail to be sufficiently concerned with the civil liberties of a minority they perceive as threatening. The protection of human rights is so essential that it has to be insulated from the majority.[3] In the 2004 presidential elections in the USA, the Republicans were returned to power despite their severe stance towards suspected terrorists.[4] Thus, the judiciary may be a weak check on government, but in many situations, it is the best that we have.

However, all this is based on the assumption that there *is* a need to check the Executive and Legislative branches of government. In the context of a war or national emergency sparked by terrorism, this need seemingly weakens and the instinctive response has been to empower and strengthen the government,[5] for one, by granting powers of indefinite detention without trial. There must be a balance such that the state is not sacrificed on the altar of human rights.[6]

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2 Quoted in Kevin Tan & Thio Li-Ann, *Constitutional Law in Malaysia & Singapore*, 2nd ed. (Asia: Butterworths, 1997) at 300.

3 Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" 116 Harv. L. Rev. 16 at 39 [Barak].

4 In a survey conducted by the National Public Radio News, Kaiser Family Foundation and Kennedy School of Government at Harvard University, a 48% of the respondents supported giving law enforcement broader authority to detain suspects indefinitely without charging them. 48% opposed and the remaining 4% did not know. This is surely a very precarious result. See Poll: Security Trumps Civil Liberties, *National Public Radio News* (30 November 2001), online: NPR News Special Report <http://www.npr.org/programs/specials/poll/civil_liberties/civil_liberties_static_results_4.html>.

5 See Victor V. Ramraj, "Terrorism, Security, and Rights: A New Dialogue" [2002] 1 Sing. J.L.S. 1.

6 Barak, *supra* note 3 at 44.

III. The Law on Preventive Detention

Both the UK and the USA reacted to the September 11 attacks with new pieces of legislation. The UK speedily enacted the Anti Terrorism Crime and Security Act ("ATCSA")[7] in the last months of 2001, with the bill rushing through Parliament in barely a month.[8] In the USA, Congress passed a joint resolution six days after the attack, authorising the President to "use all necessary and appropriate force" against those "he determines" were responsible for the terrorist attacks on September 11 (the "AUMF").[9] A few weeks later, Congress also enacted the USA PATRIOT Act ("Patriot Act"),[10] "after minimal hearings and scant debate".[11]

In contrast, this flurry of legislative activity was absent in Singapore, who "had only to perform a relatively minor tweaking of its laws."[12] The power of detention without trial for a potentially unlimited amount of time had already existed in Singapore since 1948, when the Emergency Regulations Ordinance was enacted to tackle the social and economic chaos brought about by guerrilla warfare carried out by the Malayan Communist Party.[13] This power continued and takes the present form of the Internal Security Act ("ISA").[14]

A. *The Infernal ISA*

Section 8 of Singapore's ISA gives the Minister the power to detain a person for any period not exceeding two years on the precondition that the President is "satisfied" that "it is necessary to do so" "with a view to preventing that person from acting in any manner prejudicial to the security of Singapore . . . or to the maintenance of public order or essential services therein". Detention may be renewed by the President indefinitely as long as the grounds for detention continue to exist.[15] The

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7 *Anti-Terrorism, Crime and Security Act 2001* (U.K.), 2001, c. 24 [*ATCSA*].

8 Christopher Harding, "International Terrorism: The British Response" [2002] 1 Sing. J.L.S. 16 at 16; Adam Tompkins, "Legislating Against Terror" [2002] P.L. 205 at 205 [Tompkins].

9 Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [*AUMF*].

10 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act), Pub. L. No. 107-56, 115 Stat. 272 (2001).

11 William C. Banks, "United States Responses to September 11" in M. Hor, V. Ramraj and K. Roach, eds., *Global Anti-Terrorism Law and Policy* (Cambridge: Cambridge University Press, 2004) at 492 [Banks].

12 Michael Hor, "Terrorism and the Criminal Law: Singapore's Solution" [2002] 1 Sing. J.L.S. 30 at 31.

13 Yee Chee Wai, Monica Ho and Daniel Seng, "Judicial Review of Preventive Detention under the Internal Security Act- A Summary of Developments" (1989) 5 Sing. L. Rev. 66 at 69.

14 *Internal Security Act* (Cap. 143, 1985 Rev. Ed. Sing.) [*ISA*].

15 *Ibid.*, s. 8(2).

power to order detention is supplemented by the power to arrest under section 74. This provision allows the police to arrest without warrant, and to detain pending enquiries, any person against whom there is "reason to believe" falls under section 8. This detention upon arrest is limited to a total of 30 days,[16] implying that the Minister must make an order within this time period or the detainee must be released.

Before Constitutional Amendment 1 of 1989,[17] article 149(1) of the Constitution of the Republic of Singapore provided for the validity of the ISA "notwithstanding that it is inconsistent with Articles 9, 13 or 14". These articles are part of the "fundamental liberties" section of the Constitution, and provide protection for the right to liberty, the freedom of movement, as well as the freedom of speech, assembly and association. Thus, detention under the ISA cannot be challenged on the basis of deprivation of these rights.

The executive power of detention under the ISA must be set in the political context of Singapore, where there is not only essentially one party in power, there is also a unicameral Parliament, so that all legislative power is concentrated in one body.[18] Moreover, because the Westminster model of government Singapore inherited from the UK,[19] this legislative body is practically fused with the executive via the connecting link of the Cabinet.[20]

B. *The Anti-Immigrant ATCSA*[21]

In the UK, the power of preventive detention was conferred by sections 21 and 23 of the ATCSA. Section 21 gives the Minister the power to preventively detain non-citizens on the basis of: (1) reasonable belief that that person's presence in the UK poses a risk to national security; and (2) reasonable suspicion that the person is a terrorist. This grant of power, like that under the ISA, is broad enough to be used against persons outside the definition of "terrorist", which in itself is a very expansive one.[22] But unlike the ISA, where the executive has to be satisfied that the detention is "necessary", the ATCSA has a lower standard of "reasonable".

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16 *Ibid.*, s. 74(4).

17 See Part III.A. below, for a detailed discussion of the Constitutional Amendment.

18 An Upper House may provide added scrutiny over proposed legislation and at the very least would have a delaying, if not a vetoing power. Giovanni Sartori, *Comparative Constitutional Engineering*, 2d ed. (Hampshire: Macmillan Press Ltd, 1997) at 184-185.

19 With one significant difference being that Singapore also has an elected president who has the ability to oversee detentions under the ISA. But this ability is a limited one—the President may only go against the advice of Cabinet if an Advisory Board under article 151(4) concurs with the President.

20 Thio Li-Ann, "The Constitutional Framework of Powers" in Kevin Tan, ed., *The Singapore Legal System*, 2d ed. (Singapore: Coronet Books, 1999) at 86.

21 For an overview of responses to terrorism in the UK before the *ATCSA* see Dana Keith, "In the Name of National Security or Insecurity?: The Potential Indefinite Detention of Noncitizen" (2004) 16 Fla. J. Int'l. L. 405 at 425-433 [Keith].

22 *ATCSA*, *supra* note 7, s. 21(2); and see Tompkins, *supra* note 8 at 211.

Notably, the ATCSA fails to provide for a time limit after the arrest of a suspect by which proceedings must be commenced against him. As a result, indefinite detention becomes a possibility even *before* the Minister makes any determination. Not surprisingly, indefinite detention is also possible after the Minister certifies the detainee to be a threat to national security. Section 23 of the ATCSA allows detention to be carried out despite removal from the UK being prevented because of law relating to international agreements or "a practical consideration". Thus, the "three-walled prison"[23] envisioned by the government becomes a "four-walled" one, making it necessary for the UK to derogate from Article 5(1) of the European Convention on Human Rights ("ECHR").[24] This derogation is akin to the erosion of the fundamental liberties in ISA cases.

C. *Triple-Barrelled Executive Power*

In the USA, the executive has used three principal means[25] to carry out preventive detention: (1) the President may designate persons as "enemy combatants" and detain them either pursuant to a Military Order[26] (for non-citizens) or the AUMF[27] (for citizens); (2) the Attorney General may take into custody any alien whom he certifies that he has "reasonable grounds to believe" is "engaged in any other activity that endangers the national security of the USA" under section 412 of the Patriot Act; or (3) the Attorney General may arrest and detain an alien pending removal proceedings via various provisions of immigration law and other laws targeting non-citizens.[28] There is no statutory maximum for the length of detention under the first two of these three means. With regard to immigration law, indefinite mandatory detention is explicitly permissible for deportable and criminal non-citizens.[29]

The "enemy combatant" designation is especially problematic because of the nebulous nature of the "war on terror". It is possible to argue that the "war on terror" is an ongoing effort, given the "polymorph and novel threats posed by

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23 See *A and ors. v. Secretary of State for the Home Department*, [2005] 3 All. E.R. 169 (H.L.) at para. 212 [*A and ors.*].

24 Keith, *supra* note 21 at 443.

25 Curiously, the US does not have specific anti-terrorist legislation, generally preferring to incorporate anti-terrorism measures into pre-existing laws. This is perhaps partially attributable to the US's inimitable system of federal government, but is probably primarily the consequence of the limited exposure the US has to terrorist attacks on home soil. Keith, *supra* note 21 at 416.

26 Military Order of November 13 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57,833 (2001).

27 *AUMF*, *supra* note 9.

28 These include the Immigration and Nationality Act of 1952, Anti-Drug Abuse Act of 1988, the Anti-terrorism and the Effective Death Penalty Act of 1996, as well as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. See Keith, *supra* note 21 at 417-425 for a discussion of these laws.

29 *Immigration and Nationality Act*, 8 U.S.C. §1226(c) (1952) [*INA*]; *ibid.* at 424.

terrorist networks"[30]—as long as terrorist cells continue to exist there will always be a threat of attack. Additionally, unlike the "reasonable grounds to believe" criteria under the Patriot Act, the Military Order only requires "reason to believe". As for the AUMF, it is not even clear that Congress intended it to be used for detaining persons. This seems to give the President near-complete freedom to designate whom he pleases as "enemy combatant". A similarly broad discretion is also available to the Attorney General under immigration law. Further, since the regime under the Military Order and the AUMF is outside the traditional civilian and military justice system, a designated "enemy combatant" may not have access to counsel or even be informed of the reasons for his designation. The exclusion of judicial review under immigration law[31] is just as worrying. This raises the issue of what Constitutional protections the detainees may be accorded and whether non-citizens and citizens have the same protection. However, one positive aspect of the law in the USA is that unlike in Singapore or in the UK, there are no formal limitations placed on fundamental Constitutional rights.

D. *A Comparison of the Laws*

A comparison of the detention regimes in all three countries reveals the ATCSA to be the harshest piece of legislation save for the USA's detention of "enemy combatants" under a military regime and the detention of aliens under immigration law.

The ATCSA is harsh because first, it specifically targets non-citizens. Both Singapore's and the USA's laws, immigration laws excepted, do not discriminate on the basis of citizenship but on the more rational basis of whoever poses a threat to security. Second, the complete exclusion of judicial review under sections 21 and 23 of the ATCSA is unparalleled in the USA[32] and Singapore.[33] Third, the ATCSA fails to specify a time period in which the Minister must commence proceedings against the detainee. Under the ISA, there is at least a 30 day maximum for pre-order detention. The Attorney General's power to detain under the Patriot Act is similarly limited to the length of time that deportation proceedings are pending.

The detention of "enemy combatants" by the USA probably cannot be challenged on the basis of discrimination. However, the uncertainty with respect to

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30 Vincent Joel-Proulx, "If the Hat Fits, Wear It, If the Turban Fits, Run for your Life: Reflections on the Indefinite Detention and Targeted Killing of Suspected Terrorists" (2005) 56 Hastings L.J. 801 at 825-826 [Joel-Proulx].

31 *INA, supra* note 29, §1226(e).

32 Again, immigration law is the exception. See *INA, supra* note 29, §1226(e). There is no explicit exclusion of judicial review under the Patriot Act.

33 Before being amended in 1989 the ISA did not have an ouster clause, and even after the 1989 amendment, judicial review still existed albeit limited to procedural matters.

the length of detention and the lack of procedural safeguards certainly make for a strong challenge on the basis of deprivation of due process. The same can also be said of the use of immigration law.

IV. The Judicial Response

With these pieces of arguably draconian legislation in place, it was only a matter of time before detainees took their grievances before the courts in each country. In *Chng Suan Tze v. Minister of Home Affairs* ("*Chng*"),[34] the Singapore Court of Appeal held for the detainees on a technical ground but in *obiter* advocated an objective standard of review. In the UK, the House of Lords flexed muscle in *A & ors. v. Secretary of State for the Home Department* ("*A & ors.*")[35] and held the indefinite detention of foreigners inconsistent with the Human Rights Act 1998.[36] The Supreme Court of the USA also held in favour of the detainees in *Rasul v. Bush*[37] and *Hamdi v. Rumsfeld*,[38] recognising the detainees' right to due process. These cases arguably showcased the judiciary at the height of protecting the individual from the horror of indefinite detention imposed by the executive. However, a closer analysis reveals that these high points may be in reality more symbolic than significant.

A. *Singapore: Ultimately Passive*

It is submitted that Singapore's judiciary is ultimately passive not because of any weakness in *Chng*, but because the courts later allowed *Chng* to be legislatively overruled without offering any hint of resistance. To my mind, *Chng* still stands out as a shining example of sound and careful judicial reasoning as the court boldly departed from precedent in order to develop the law.

1. *From Subjective to Objective*

Before *Chng*, there was the case of *Lee Mau Seng v. Minister for Home Affairs* ("*Lee*"),[39] to which the later ISA amendment had pegged the law of judicial review. In *Lee*, the court held that the satisfaction of the President, a precondition for detention, was a "purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention".[40] Thus, the court

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34 [1988] 1 Sing. L.R. 132 (C.A.) [*Chng*].
35 *A and ors.*, *supra* note 23.
36 *Human Rights Act 1998* (U.K.), 1998, c. 42.
37 542 U.S. 466 (2004) [*Rasul*].
38 542 U.S. 507 (2004) [*Hamdi*].
39 [1971] 2 Mal. L.J. 137 (Sing. H.C.).
40 *Ibid.* at 145.

found that an affidavit by the Minister of Home Affairs was sufficient evidence of Presidential satisfaction. The court also rejected the argument that it should be able to inquire into the bona fides of the President.[41] In this respect, the *Lee* subjective standard is more deferential than that propounded in the landmark case of *Liversidge v. Anderson* ("*Liversidge*").[42] There, Lord Macmillan (part of the majority) stated that the Secretary of State had to consider that sufficient grounds existed for detention *and* act in good faith.[43]

However, even this standard was too low for the Court of Appeal deciding *Chng*, who preferred Lord Atkin's dissenting approach. The court's endorsement of the objective standard of review meant that judges could examine whether the executive's decision was in fact based on national security considerations, as well as whether the executive's considerations in determining the detention necessary fell within the scope of the purposes specified in section 8(1) of the ISA. The Chief Justice memorably said, "[a]ll power has legal limits and the rule of law demands that the courts be able to examine the exercise of discretionary power."[44]

2. *The Legislature Intervenes*

Unfortunately, less than two weeks after the decision in *Chng*, it was announced that the ISA would be amended to restore the law to its former state.[45] Approximately a month later, Parliament passed two bills—the first to amend the Constitution;[46] and the second, to amend the ISA.[47] The "main purpose" of both bills was to restore the law on judicial review of Executive discretion under the ISA to the "subjective test" applied in *Lee*.[48]

In order to achieve this purpose, articles 8A, 8B, 8C and 8D were added to the ISA to define "judicial review",[49] limit the scope of judicial review to procedural matters, remove appeals to the Privy Council, and allow the amendments to operate retrospectively. The Constitution also had to be amended to pre-empt challenges to the ISA amendments. First, appeals to the Privy Council from Part XII (Special Powers Against Subversion and Emergency Powers) were removed. Second, the notwithstanding clause in article 149(1)(e) was expanded

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41 *Ibid.*

42 [1942] A.C. 206 (H.L.).

43 *Ibid.* at 248.

44 *Chng*, *supra* note 34 at para. 86.

45 *Supra* note 13 at 98.

46 *Constitution of the Republic of Singapore (Amendment) Act*, No. 1 of 1989.

47 *Internal Security (Amendment) Act*, No. 2 of 1989.

48 Sing., *Parliamentary Debates*, vol. 52, col. 463 at 463 (25 January 1989) (Prof. S. Jayakumar).

49 This included proceedings instituted by way of *habeas corpus* and "any other suit or action relating to or arising out of any decision made or act done" under powers conferred by the ISA. *ISA*, *supra* note 14, s. 8A(c) and (d).

to include references to articles 11 (Protection Against Retrospective Criminal Laws) and 12 (Equality).[50] Finally, it was made clear that the notwithstanding clause applied to *amendments* to the laws against subversion, not just to existing laws.[51]

Significantly, when the Bill to amend the Constitution was tabled, there were 81 elected Members of Parliament ("MP")—80 from the PAP.[52] Considering that a Bill amending the Constitution requires a supporting vote of not less than two-thirds of the total number of elected MPs to be passed, and that the Party Whip cannot be lifted for Constitutional bills,[53] the success of the Constitutional Amendment was a foregone conclusion. Thus, *Chng* was easily and comprehensively overruled in a day.[54]

3. *Back to the Subjective Standard*

Yet the Singapore judiciary was given another chance at reasserting the objective standard in *Teo Soh Lung v. Minister of Home Affairs* ("*Teo*").[55] There, the appellant argued that the purported amendments to section 8 of the ISA were unconstitutional. Admittedly, because of the Legislature's careful efforts to immunise the amendments to the ISA from challenge, the court would have had to take a far bolder step than it did in *Chng*. The only way that the appeal could be allowed was if the court took a "thick" formulation of the Rule of Law as requiring the judiciary to have the ability to substantively review executive decisions. This argument could be founded on the principle of separation of powers that

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50 The Minister for Law explicitly stated that the inclusion of article 11 was necessary to ensure the retrospective application of the Internal Security (Amendment) Bill was not challenged, and article 12 was necessary because the Court of Appeal had commented that a subjective test might be inconsistent with the right to equality. *Supra* note 48 at 473-473.

51 Article 149(1) as amended now reads:

> "If an Act recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore—
> ...
> (e) which is prejudicial to the security of Singapore, any provision of that law designed to stop or prevent that action or any amendment to that law or any provision in any law enacted under clause (3) is valid notwithstanding that it is inconsistent with Article 9, 11, 12, 13 or 14, or would, apart from this Article, be outside the legislative power of Parliament."

52 The only elected opposition MP was Chiam See Tong who voted against the Constitutional Amendment Bill. See *supra* note 48 at 529; and "Members of Parliament (7th Parliament)", *Parliament of Singapore* (last reviewed 22 March 2006), online: <http://www.parliament.gov.sg/AboutUs/Org-MP-PastMP7.htm>.

53 Li-Ann Wee "PAP MPs to vote freely on school reforms" *Straits Times* (17 November 2002).

54 Like the anti-terrorist legislation in the UK and US, speedy parliamentary action accompanied curtailment of civil liberties.

55 [1989] 2 Mal. L. J. 449 (Sing. C.A.).

the Constitution is implicitly premised on[56] as well as fundamental principles of natural justice.[57]

However, the court took a very "thin" and positivistic approach, holding that reaffirming the subjective test of judicial review in *Lee* cannot be said to be contrary to the Rule of Law or usurping judicial power. This was because Parliament was doing no more than enacting the Rule of Law relating to the law applicable to judicial review. This reasoning seems to imply that Singapore courts will not question any act of the Legislature as long as it is procedurally sound—a significant regression from *Chng*. In light of Singapore's political context, this "thin" formulation of the Rule of Law further weakens the ability of the judiciary to check possible abuse of detention under the ISA.

B. *The United Kingdom: Active (Relatively)*

An inherent limitation to the UK court's power of judicial review is that unlike in Singapore or the USA, the UK does not have a supreme written Constitution. Thus, the UK courts do not have the power to strike down legislation as invalid.[58] However, under the Human Rights Act, the court may determine if a piece of primary legislation is compatible with the Act.[59]

This was the power that the House of Lords used in *A & ors*, where it held eight to one that the UK's derogation was not authorised by article 15 of the ECHR. Article 15(1) required that measures derogating from ECHR obligations must be "to the extent strictly required by the exigencies of the situation".[60] The court then quashed the derogation order and issued a declaration of incompatibility. In this discussion, I will focus on the standard of review that the court applied in coming to this conclusion.

1. *Is there "a public emergency threatening the life of the nation"?*

In determining whether derogation was justified, the majority showed deference to the executive. This is seen most clearly in the judges' various interpretations of *Ireland v. UK*, where the European Court of Human Rights held that:

> By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are . . . in a better position than the

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56 It was recognized in *Hinds v. The Queen*, [1977] A.C. 195 (P.C. on appeal from Jamaica) that the basic principle of separation of powers were a "necessary implication" in Constitutions based on the Westminster model, of which Singapore's is an example.

57 In *Ong Ah Chuan v. Public Prosecutor*, [1980] A.C. 64 at 71 (P.C. on appeal from Singapore), the Privy Council held that the "law" means a system of law that incorporates fundamental rules of natural justice.

58 Keith, *supra* note 21 at 414.

59 *Human Rights Act*, *supra* note 36, s. 4.

60 *European Convention on Human Rights*, 4 November 1950, T.S. 71 (1953) art. 15(1).

> international judge to decide both on the presence of . . . an emergency and on the nature and scope of derogations necessary to avert it.[61]

The majority took this to mean that great weight should be given to the judgement of the executive because "a pre-eminently political judgement" was involved.[62] However, Lord Hoffman read *Ireland v. UK* very differently. He reasoned that since the Strasbourg court felt unsuited to make the decision, it was for the UK court to decide the matter for itself![63]

This divergence of views goes to the issue of justiciability—the majority's approach is based on the premise that some matters, for example political decisions and decisions of national security, are outside the function of the judiciary and solely for the executive and legislature. Lord Bingham's judgement implies that this reluctance has two sources: a fear of encroaching on the territory of the other branches of government; and a fear of incompetence.[64] Lord Hoffman apparently found clear authority in the Human Rights Act to justify review of the existence of a public emergency and did not address the concerns of his fellow judges.

2. *Were the measures taken "strictly required by the exigencies of the situation"?*

However, on the issue of proportionality, the majority clearly felt that it was necessary for them to play a substantial reviewing role. Lord Hope of Craighead stated:

> We are dealing with actions taken on behalf of society as a whole which affect the rights and freedoms of the individual. This is where the courts may legitimately intervene, to ensure that the actions taken are proportionate.[65]

Thus, any restriction of the right to personal liberty had to be closely scrutinised by the national court. The majority then held that section 23 of the ATCSA did not rationally address the threat that the government sought to address—the threat to security presented by Al Qaeda terrorists and their supporters. This was because the threat did not derive solely from foreigners but also from UK nationals. In fact, a significant number of persons suspected of terrorist involvement in the UK are British citizens.[66] Section 23, being discriminatory, could not be strictly required within article 15 of the ECHR and so was disproportionate. Lord Nicholls summed up the position of the majority aptly—"indefinite imprisonment without charge or trial is anathema in any country which observes the rule

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61 *A and ors.*, *supra* note 23 at para. 18.
62 *Ibid.* at para. 29.
63 *Ibid.* at para. 92.
64 *Ibid.* at para. 18.
65 *Ibid.* at para. 108.
66 *Ibid.* at para. 76.

of law ... wholly exceptional circumstances must exist before this extreme step can be justified".[67]

Evidently, the courts are active when they are called upon to enforce individual rights by exercising a power conferred by explicit statutory terms. It is when they have to define their own judicial role that the English judges tend to be more cautious and deferential. The judges are also more active when dealing with the legal concept of "proportionality", unlike the factual enquiry (arguably within the discretion of the democratic organs of the state) of whether there is a "public emergency threatening the life of the nation". Perhaps the court also did not want to do more than it had to in order to achieve the result that the provisions of the ATCSA relating to indefinite detention of non-citizens were invalid.

C. *The United States of America: Ambivalent*

The USA is well-known for its civil libertarian tradition, especially when it comes to constitutional rights.[68] Since nearly all of these constitutional rights are expressed as rights of "persons", it follows that aliens in the USA, and not merely citizens, ought to enjoy substantial constitutional protection.[69] However, the judiciary has not consistently provided protection for non-citizens and instead has shown considerable deference to the executive in many cases.[70]

1. *The Scope of Constitutional Protection for Non-Citizens*

Despite the USA having the capability to detain both citizens and non-citizens under the anti-terrorist rubric, non-citizens have more laws targeted at them than do citizens. For example, the Patriot Act does not address the preventive detention of citizens, but only non-citizens. Additionally there is the use of immigration law. In *Demore v. Hyung Joon Kim*,[71] Hyung was a Korean citizen and permanent resident of the USA who had been convicted of burglary as well as petty theft and subsequently detained under the Immigration and Nationality Act pending removal proceedings. In a writ for *certiorari*, the USA Supreme Court upheld mandatory preventive detention without any individualized assessment of the need for detention,[72] on the basis that "Congress regularly makes rules that would be unacceptable if applied to citizens".[73] This was despite the general protection offered by the Constitution.

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67 *Ibid.* at para. 74.

68 Joel-Proulx, *supra* note 30 at 836.

69 Karen C. Tumlin, "Comment, Suspect First: How Terrorism Policy is Reshaping Immigration Policy" (2004) 92 Calif. L. Rev. 1173 at 1182.

70 Joel-Proulx, *supra* note 30 at 838.

71 538 U.S. 510 (2003).

72 David Cole, "Are Foreign Nationals Entitled to the Same Constitutional Rights As Citizens? (2003) 25 T. Jefferson L. Rev. 367 at 368.

73 *Ibid.* at 521.

In contrast, the recent case of *Rasul v. Bush* ("*Rasul*")[74] augurs better for non-citizens. There, the Supreme Court recognized the right of *habeas corpus* for detainees at Guantanamo Bay who were not USA citizens. Because the Solicitor General had conceded that the court would have *habeas* jurisdiction over a USA citizen in Guantanamo, the court held that:

> Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.[75]

This is a clear statement that constitutional protection ought to apply equally to citizens and non-citizens made in the context of detention of persons captured in the course of a military campaign. What more someone like Hyung who was lawfully within the USA and had merely committed burglary and petty theft?

However, although arriving at a fair result, the *Rasul* decision focused on the interpretation of a statute rather than with substantive issues. Justice Kennedy, who concurred in the majority's judgement, wrote separately to express a different approach. He would have assessed the factual situation and asked if the circumstances permitted judicial interference with the executive and Congress.[76] This approach recognises that "there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated".[77] Further, *Rasul* was decided solely on the issue of jurisdiction and it remains to be seen what reasoning the court would employ in dealing with the due process issues in the case.

2. *Indefinite detention without trial of "enemy combatants"*

The issue of due process did arise in *Hamdi v. Rumsfeld* ("*Hamdi*").[78] Like Rasul, Hamdi was captured in Afghanistan in the course of the USA's military campaign and designated an "enemy combatant". Unlike Rasul, Hamdi was a citizen of the USA and detained on a naval brig off the coast of the USA rather than at Guantanamo. In the period of over two years that Hamdi was detained, he was denied the right to send or receive any communication outside his prison and denied access to counsel to represent him.

Ultimately, the court held eight to one that Hamdi had not received due process and ordered that Hamdi was entitled to present his own factual case to rebut the Government's position. This was surely a fair result, but in arriving at this conclusion, the plurality showed a large amount of deference to the executive.

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74 *Rasul, supra* note 37.
75 *Ibid.* at 481.
76 *Ibid.* at 487.
77 *Ibid.*
78 *Hamdi, supra* note 38.

First, on the issue of authorization, five judges interpreted the AUMF broadly and held that it authorized the detention of "enemy combatants". The requirement in section 4001(a) of the Non-Detention Act (that a detention be "pursuant to an Act of Congress") was thus satisfied. Despite the absence of any reference to detention in the AUMF, the plurality held that since in passing the AUMF Congress intended to target individuals who fought against the USA in Afghanistan, this extended to detaining them to prevent them from rejoining the conflict. Detention was authorized as long as USA troops were involved in active combat in Afghanistan.

However, this is in reality a very easily satisfied requirement and hardly justifies detention nor limits its length. As pointed out by Justice Souter, in light of the circumstances of its adoption, surely section 4001(a) required a clear statement of Congressional intent to detain individuals.[79] Justice Scalia, joined by Justice Stevens went even further to argue that based on historical precedent, the government could only detain Hamdi: (1) if Congress had suspended the right to *habeas corpus*; or (2) after a criminal law trial.[80]

Second, with respect to the constitutional rights of a citizen who disputes his "enemy combatant" status, the judges also had different views on the application of the Fifth Amendment.[81] The plurality, in a very deferential tone, held that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker.[82] In Hamdi's case, the core elements of due process were not met because "interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker".[83] However, as if worried that its holding might offend the government, the plurality went on to state that where the exigencies of the circumstances demanded, aside from the core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.[84] For example, hearsay evidence from the government may be accepted and there could also be a rebuttable presumption favouring the government's evidence.[85] This may be contrasted with the criminal law standard advocated in Justice Scalia's dissent, which would grant maximum protection to the individual.

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79 A stated purpose of the Non-Detention Act was to prevent a repeat of the arbitrary detentions of loyal Americans of Japanese ancestry during World War II. *Ibid.* at 543-544.

80 *Ibid.* at 573.

81 That no "life, liberty, or property" could be taken without "due process of law".

82 *Ibid.* at 533.

83 *Ibid.* at 537.

84 *Ibid.* at 533-534.

85 *Ibid.*

However, in its favour, the plurality explicitly stated that:

> Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organisations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.[86]

V. The Ideal Role for the Judiciary

Extreme formulations of the judicial role may be rejected. I do not think anyone could advocate giving the executive absolute power and doing away with the Constitution in the event of a terrorist attack. Neither could a reasonable person argue for absolute adherence to the letter of the Constitution—"a constitution is not a prescription for national suicide".[87] Where the controversy arises, is in striking that elusive balance between security and freedom.

According to Justice Aharon Barak, President of the Israeli Supreme Court, the judicial role consists of two elements: (1) to bridge the gap between law and society; meaning that the judge is a partner in creating law and in doing so, must maintain the coherence of the legal system as a whole; and (2) to protect the constitution and democracy; this means that judges must use the powers granted them by the constitution to safeguard both formal democracy (as expressed in legislative supremacy), and substantive democracy (as expressed in basic values and human rights).[88] In countering terrorism, this judicial role remains relevant and important—"amid the clash of arms, the laws are not silent"[89]—it is up to the judge to give voice to the laws.[90]

I submit that Justice Barak's formulation of the judicial role is a workable one. Since law cannot be made in a vacuum, it is important to consider the specific circumstances of each country in the fulfilment of the judicial role. This concern is addressed when the judge seeks to bridge the gap between law and society. However, there are some constant principles that ought not to be contravened and these are the principles of democracy, separation of powers and individual liberty that form the basis of the legal systems of Singapore, the UK and the USA.

A. *Singapore: Failure to Address Substantive Democratic Concerns*

In Singapore, the acceptance of the subjective test and thus deferring to executive determination is perhaps understandable. In order to bridge the gap between

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86 *Ibid.* at 536.

87 Barak, *supra* note 3 at 153.

88 Barak, *supra* note 3 at 25-26.

89 *Liversidge*, *supra* note 42.

90 After all, what distinguishes counter-terrorism from terrorism, is that terrorism has no regard for the law whereas counter-terrorism does.

law and society, the Singaporean judge has to consider the entire legal system and the principles that are important to it. This was probably what led the court in *Chng* to advocate an objective test despite the *ratio* of the case being on a technical issue of lack of evidence. It examined the jurisprudence in other Commonwealth jurisdictions, noticed that the law had developed since *Lee*, found this development applicable to Singapore, and set the stage for a coherent creation of law.

However, the judicial role also consists of upholding the constitution and democracy. In the face of clear constitutional and legislative language, the *Teo* court could only interpret the law to produce one outcome, an outcome that recognised legislative supremacy. Where the *Teo* court failed was in giving recognition to *substantive* democracy. The issue ought not to have been whether in passing the particular amendment Parliament was complying with previous judicial pronouncement, but whether Parliament had accorded detainees sufficient protection in light of the amendment. In coming to a decision on this issue, the court should take into account the sufficiency of the remaining safeguards should judicial supervision be removed.

This is not to ask for a fail-safe system, but one that accords with the spirit of article 151 of the Constitution, which provides for restrictions on preventive detention. Namely that the detainee: (1) be informed of the grounds of his detention as soon as may be; (2) be informed of the allegations of fact on which the order is based subject to disclosures that in the authority's opinion would be against the national interest; and (3) be given the opportunity of making representations against the order as soon as may be.[91] If this criteria is not met, then limiting judicial review to procedural grounds ought to be held unconstitutional.

Article 151 should be interpreted liberally in favour of the individual. In *Ong Ah Chuan v. Public Prosecutor*, the court held that Chapter IV of the Constitution should be generously interpreted "to give to individuals the full measure" of their constitutional liberties.[92] This should all the more be the case for article 151 liberties, which have already been whittled down as a result of the notwithstanding clause in article 149. Thus, having a presumption in favour of government evidence should be unacceptable, so should accepting hearsay evidence from the government.[93]

B. *The United Kingdom: Uncertainty as to Justiciability*

In dealing with the issue of proportionality in *A & ors.*, the English House of Lords fulfilled their judicial role admirably and held the ATCSA inconsistent with the Human Rights Act because it was discriminatory. The court upheld democracy and individual liberty while giving due recognition to legislative supremacy. It

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91 *Constitution of the Republic of Singapore* (1999 Rev. Ed.), art. 151.

92 *Ong Ah Chuan, supra* note 57 at 70.

93 As was the plurality's opinion in *Hamdi*.

also bridged the gap not only between law and society, but also between law and the European community that it was situated in. However, the court's shying away from questioning the executive determination of whether there was a public emergency that threatened the life of the nation, presents an unresolved problem.

Admittedly, the interaction between the three branches of power produces a tricky legal problem. Lord Bingham's concerns of antagonising the executive and being ill-equipped to tackle "political" issues are well-founded ones. However, the problem with classifying decisions as "political" or relating to "national security" is that the judiciary effectively abdicates from examining these issues. Surely a better balance could be struck. I propose to tackle this issue by asking "does the judicial role formulated by Justice Barak require judges to adjudicate the existence of a public emergency?"

First, judges need to create a coherent framework of law in partnership with the legislature. Judges in the highest court of any country need to bear in mind that the precedents they lay down have a long-lasting impact. It takes many years for common law to move beyond an established precedent; take for example the majority decision in the 1941 case of *Liversidge*, which established the subjective test in matters of national security. The first indication that the majority might be wrong surfaced a decade later in the Privy Council decision of *Nakkuda Ali v. Jayaratne*.[94] In 1980, the courts were still grappling with *Liversidge* in *Ex parte Rossminster*.[95] There, Lord Diplock stated, "the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* . . . were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."[96]

Ironically, the majority opinion in *Liversidge* still holds sway in Singapore. Further, a study of cases from the USA Supreme Court shows that justices are significantly more likely to curtail rights and liberties during times of war and other international threats; and that cases directly related to war affect cases unrelated to the war.[97] These empirical results are in all likelihood applicable to the UK. What this means is that the curtailment of civil liberties during times of crisis will lead to restrictions of fundamental freedoms even in times of peace. Thus, it follows that judges ought not to let the executive invoke an "emergency" too easily.

Second, the judges' role is also to uphold democracy and the constitution, whether written or unwritten. A crucial portion of the constitution is the protection of civil liberties, thus the same reasoning as above should apply. However, judges should also recognize legislative supremacy, which too is a constitutional principle. Therefore, with regards to determining whether a public emergency

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94 [1951] A.C. 66.

95 [1980] A.C. 952.

96 *Ibid.* at 1011.

97 Lee Epstein *et al.*, "The Supreme Court During Crisis: How War Affects Only Non-War Cases" (2005) 80 N.Y.U.L. Rev. 1 at 8-9 [Epstein].

threatening the life of a nation exists, judges ought to give due weight to a formal declaration of emergency or legislation that explicitly limits the judicial role.

C. *The United States of America: Lack of Consistency*

Unlike the UK judiciary, USA courts have the powerful tool of striking down legislation that is inconsistent with the Constitution. And unlike the Singapore courts, the USA courts are relatively unconstrained by legislation, with the exception of provisions of immigration law. However, as established in the study described above, the USA Supreme Court tends to curtail rights and liberties when the nation's security is under threat and allows these limitations to carry over into the decision of ordinary cases. This failure to consistently insist on constitutional protection inhibits the court's ability to fulfil its ideal judicial role.

First, with regard to the distinction between citizens and non-citizens, it is perhaps true that such a distinction lies at the heart of immigration law. However, where the Constitution offers general protection to both citizens and non-citizens, it should surely take precedence over ordinary legislation. Like the Singapore court in *Teo*, the USA courts seem to be avoiding the issue- instead of addressing what constitutional protections a detainee has, the courts have carried out exercises in statutory interpretation. For example in *Rasul*, the court justified *habeas* jurisdiction over Guantanamo detainees based on the interpretation of the federal *habeas* statute, rather than choosing to proceed with a factual inquiry and balance the detainee's constitutional rights against the requirements of security.[98] In the words of Epstein *et al.*, perhaps "in an effort to protect itself, [the Court] employed process-oriented rationales to the detriment of substantive determinations of first-order constitutional rights."[99] More attention needs to be paid to *substantive* democracy.

Second, with regard to the case of *Hamdi*, the same criticism can be made of the plurality's approach to the authorisation of detention. The majority took to interpreting the AUMF where the better approach would have been that of Justice Souter, which was to deal with the *substantive* aspects of allowing detention to be authorised by an uncertain Congressional resolution. In *Hamdi*, the court also failed to bridge the gap between law and society because it created a new regime for enemy combatants that was inconsistent with the existing legal system. Although commendably recognising that it should play a role in protecting the due process rights of American citizens, the court gave itself such a bit part that it essentially "Ma[d]e Everything Come Out Right" for the executive.[100] The "neutral decisionmaker" suggested by Justice O'Connor could well be a military commission and not a civilian court.[101] The "core elements" of factual notice and

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98 This was the framework that Justice Kennedy would have followed.

99 Epstein, *supra* note 97 at 100.

100 Justice Scalia further criticized the plurality as having a "Mr. Fix-it Mentality". See *Hamdi*, *supra* note 38 at 576.

101 Banks, *supra* note 11 at 506.

an opportunity for rebuttal are also probably insufficient to safeguard the right to due process, especially if hearsay evidence is admitted and a presumption exists in favour of the government's evidence. Although the detainee may be able to see the evidence against him, that evidence may consist of a sketchy and uncorroborated affidavit like the Mobbs affidavit that was filed in *Hamdi*.[102] The detainee would additionally have the burden of showing that those allegations are false, even though it might be next to impossible to find witnesses to support his story.[103] This manner of law-making surely distorts the civil libertarian tradition of the USA legal system and fails to meet the ideal judicial role for the American judiciary.

VI. Conclusion- The Aftermath

This paper sought to establish that the ideal role for the judiciary in its treatment of possibly indefinite preventive detention is unique to each country, but ought to fulfil the tasks of: (1) developing laws coherently in partnership with the legislature; and (2) upholding democracy and the Constitution. A look at the aftermath of the judicial responses described above largely supports this view.

A. *Singapore: Status Quo?*

In Singapore, the ISA has gone unchallenged by detainees who were suspected of terrorism. This could be a sign that the ISA has thus far been used only against the guilty, or it could also be due to the perceived futility in bringing such a challenge. Either way, with a newly installed Chief Justice,[104] it is possible that the Singapore courts may take a different view of their judicial role in the area of indefinite preventive detention.

B. *The United Kingdom: Repeal of Offending Legislation*

Change has occurred in the UK after the House of Lords took a relatively firm stance in *A & ors*. The UK legislature has repealed the offending provision of the ATCSA and indefinite preventive detention has been *prima facie* abolished. However, under the Prevention of Terrorism Act 2005,[105] the executive has the power to issue control orders against individuals on similar grounds. These control orders may be derogating (from article 5 of the Human Rights Act) or non-derogating. All the control orders issued thus far have been non-derogating

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102 *Ibid.*

103 *Ibid.*

104 "Era ends as CJ steps down" *TODAY (Singapore)* (1 April 2006). Chan Sek Keong is the current Chief Justice of Singapore. According to the article, no "sweeping changes" to the administration of the Judiciary are expected but there might be other "small changes". Mr. Chan is described by an unnamed lawyer as "'a very sharp person' who loves the law: 'He knows how to temper his judgements with mercy"'.

105 *Prevention of Terrorism Act 2005* (U.K.) 2005, c. 2.

ones. However, according to Lord Carlile, the independent reviewer, most of the obligations imposed on the controllees "fall not very far short of house arrest and certainly inhibit normal life considerably".[106] This may raise issues of deprivation of liberty for the UK courts to address.

C. *The United States of America: New Executive and Legislative Action*

As for the USA, the ambivalent judicial response has led to more executive and legislative activity to the detriment of detainees. In response to *Hamdi*, the Department of Defence has convened Combatant Status Review Tribunals ("CSRT") to provide detainees at Guantanamo the chance to challenge their designation as "enemy combatants".[107] The CSRT arguably satisfies the "core elements" identified by the plurality in *Hamdi* as necessary for due process.[108] The courts have recently been called upon to examine the CSRT in *Hamdan v. Rumsfeld*.[109]

Hamdan, allegedly the driver and bodyguard of Osama bin Laden, filed a *habeas* petition with the D.C. District Court after being certified an "enemy combatant" by the CSRT.[110] The District Court held that Hamdan could not be tried by a military commission unless a competent tribunal determined that he was not a Prisoner of War as defined under the 1949 Geneva Convention governing the treatment of prisoners. The Court of Appeal reversed and, in doing so, rejected Hamdan's argument that the President violated the separation of powers inherent in the Constitution when he established military commissions. The court took the same deferential approach of the plurality in *Hamdi*—that Congress had authorised military commissions through the AUMF.[111]

Although the Supreme Court recently reversed the Court of Appeal decision,[112] it did so on a narrower basis than did the District Court—that Congress, via the AUMF, did not expressly authorise military commissions

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106 U.K., Lord Carlile, *First Report of the Independent Reviewer Pursuant to Section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006), online: Home Office <http://security.homeoffice.gov.uk/news-and-publications1/publication-search/independent-reviews/laws-against-terror.pdf>.

107 Kathleen T. Rhem, "Reporters Offered Look Inside Combatant Status Review Tribunals" *DefenseLINK News* (29 August 2004), online: US Department of Defence <http://www.defenselink.mil/news/Aug2004/n08292004_2004082902.html>.

108 In these proceedings, detainees are allowed a personal representative, who is an assigned military officer. The personal representatives are obligated to present any unclassified evidence to the detainee and explain there is no expectation of confidentiality in the process. *Ibid.*

109 415 F.3d 33 (2005).

110 *Ibid.* at 35-36.

111 *Ibid.* at 37-38.

112 126 S. Ct. 2749 (2006).

and that the CSRT structure did not meet the procedural elements that Congress, through the Uniform Code of Military Justice, required. The limitations of *Hamdan* are especially obvious in light of the fact that soon after the Supreme Court decision was released, President Bush sought Congressional authorization of the military commissions as constituted under the executive order.[113]

True enough, Congress passed the Military Commissions Act ("MCA") in late September.[114] The MCA poses a great threat to non-US citizen detainees deemed "unlawful enemy combatants" by the CSRT because it removes the jurisdiction of USA Courts to consider habeas corpus appeals challenging the lawfulness or conditions of detention from these individuals.[115] In a later part of the Hamdan saga, after the enactment of the MCA, *habeas corpus* was denied Hamdan based on the MCA.[116] This series of events aptly illustrates how powerful the Executive and Legislature can be, especially if the pronouncements by the Judiciary are deferential.

However, to end the story of Hamdan, on 5 June 2007, the Military Commission dismissed all charges against him on the ground that the administration had failed to establish that he was an "unlawful enemy combatant" and thus subject to the jurisdiction of the Military Commission.[117] Nevertheless, it is hoped that when the currently pending cases of other detainees arise for decision, the USA Courts will give more weight to the substantive Constitutional protection due them.[118]

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113 Tung Yin, "Coercion and Terrorism Prosecutions in the Shadow of Military Detention" [2006] B.Y.U.L. Rev. 1255 at note 188.

114 This article will only deal briefly with the Military Commissions Act, it being a relatively recent piece of legislation, which the courts have had little opportunity to comment on. For a general discussion of the Military Commissions Act see Jennifer Trahan, "Military Commission Trials at Guantanamo Bay, Cuba: Do they Satisfy International and Constitutional Law?" (2007) 30 F.I.L.J. 280.

115 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), s. 7(a):

> (e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

116 *In re Hamdan*, 126 S. Ct. 2749; "Judge Rejects Detention Challenge of Bin Laden's Driver" *Washington Post* (14 December 2006).

117 "Stuck in Guantanamo" *Washington Post* (7 June 2007).

118 The US Supreme Court will have a chance to review the MCA when the cases of *Boumediene v. Bush*, 2007 U.S. LEXIS 8757 and *Al Odah v. U.S*, 2007 U.S. LEXIS 8810 arise to be heard later in 2007. Also see "Justices to Weigh Detainee Rights" *Washington Post* (30 June 2007).